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Nos. 88-495 and 88-5727

In the Supreme Court of the United States

OCTOBER TERM, 1988

HERBERT ROBERTS AND JOAN ROBERTS, PETITIONERS

v.

UNITED STATES OF AMERICA

LEWIS BROMBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that exceptions to the exclusionary rule apply to suppression motions made under Fed. R. Crim. P. 41(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a)[1] is reported at 852 F.2d 671. The opinion of the district court granting petitioners' motion under Fed. R. Crim. P. 41(e) (Pet. App. 13a-52a) is reported at 656 F. Supp. 929. The opinion of the district court denying the government's motion for reconsideration (Pet. App. 53a-58a) is reported at 675 F. Supp. 108.

[1] "Pet. App." refers to the Appendix to the petition in No. 88-495.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1988. The petition for a writ of certiorari in No. 88-495 was filed on September 19, 1988. Justice Marshall extended the time for filing a petition for a writ of certiorari in No. 88-5727 to October 19, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in New York has been investigating suspected commercial bribery of corporate purchasing agents by stationery suppliers. In connection with that investigation, a search warrant was issued on May 27, 1986, by a magistrate in the Southern District of New York. The warrant authorized the search for and seizure of records from petitioners' stationery distributing business, Transnational Supply Warehouse, Inc. Pet. App. 3a. The warrant described a large variety of business records that were to be seized, listing the records by specific categories. Pet. App. 3a n.2. The terms of the warrant also encompassed records belonging to Statewide Office Supply, a company that shared space with Transnational; the executing agents, however, were orally instructed not to seize any records that belonged to Statewide. Pet. App. 4a.

Following the search, petitioners Herbert Roberts, Joan Roberts, and Lewis Bromberg filed a motion in the United States District Court for the Southern District of New York seeking the return of illegally seized documents. The motion was filed pursuant to Fed. R. Crim. P. 41(e). Petitioner Herbert Roberts is the president of Statewide Office Supply; petitioner Lewis Bromberg is the secretary and vice-president of Statewide; and petitioner Joan Roberts is the president and sole shareholder of M.I.S.S., Inc.,

which shared office space with Transnational and Statewide. Pet. App. 17a-18a. All three petitioners alleged that their companies did business at the same storefront in Manhattan, and that the postal inspectors who executed the warrant seized personal records and business records belonging to their companies, in violation of the Fourth Amendment. Pet. App. 18a. Pursuant to Rule 41(e), they sought both the return of the documents and the suppression of those documents from use at any future trial.[2]

The district court granted the motion. It ruled that the search warrant was so broad as to amount to a general warrant and that there was no probable cause for the seizure of many of the documents. The government argued that even if the warrant was overbroad, the documents were not subject to suppression because they fell within one or more of the judicially recognized exceptions to the exclusionary rule. In response to that argument, the district court held that the exceptions to the exclusionary rule that permit the admission of illegally seized evidence under certain circumstances are not applicable to motions filed under the authority of Fed. R. Crim. P. 41(e). Pet. App. 13a-52a.

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[2] No indictment has yet been filed against petitioners. Rule 41(e) states as follows:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

The court of appeals reversed the district court's order but remanded the case to the district court for further findings (Pet. App. 1a-12a). It did not reach the question whether the warrant was sufficiently particularlized to be valid, because the government conceded that probable cause was lacking as to certain of the documents that had been seized. Those documents, the court noted, would be admissible only if some exception to the exclusionary rule were available. The court therefore addressed the general question whether the judicially recognized exceptions to the exclusionary rule apply to preindictment motions for the suppression of evidence under Fed. R. Crim. P. 41(e). Pet. App. 4a.

The court of appeals held that the district court had erred in ruling that the exceptions to the exclusionary rule do not apply to motions made under Rule 41(e). The court concluded that Rule 41(e) was intended to be a procedural rule only and that it did not create substantive grounds for suppressing evidence that are not available in other settings, such as in the case of motions to suppress evidence at trial brought under Fed. R. Crim. P. 12(b)(3). Rule 41(e) did not codify principles of search and seizure law, the court explained, but instead was meant "to reflect the substantive law and to follow changes therein." Pet. App. 6a.

The court then turned to the exceptions to the exclusionary rule that the government argued were applicable here. The court found that the only exception to the exclusionary rule that might be applicable to this case was the "good faith" exception that this Court recognized in *United States* v. *Leon,* 468 U.S. 897 (1984). Because the district court had held that the good faith exception could never be invoked in response to a preindictment motion under Rule 41(e), the court had made no determination as to whether the officers' reliance on the warrant was objec-

tively reasonable. The court of appeals therefore remanded the case to the district court for an initial finding of fact on that issue. Pet. App. 9a-10a.

ARGUMENT

1. Because the court of appeals remanded this case to the district court for findings regarding the applicability of the "good faith" exception to the exclusionary rule, this case is not now ripe for review by this Court. On remand, the district court might find the good faith exception inapplicable on the facts of this case and grant the relief petitioners seek, in which case the need for review by this Court would be avoided. In the alternative, the district court might hold the good faith exception applicable on the facts of this case and the court of appeals might reverse, again rendering unnecessary any review by this Court at petitioners' behest. Only if the district court on remand and the court of appeals after a second appeal should find the good faith exception applicable would this case be ripe for this Court's review.

2. On the merits, petitioners contend that the court of appeals erred in construing Rule 41(e) to recognize the exceptions to the exclusionary rule. The court of appeals' analysis, however, was correct, and there is no conflict among the circuits on this issue. Accordingly, there is no reason for review by this Court.

Petitioners claim (88-495 Pet. 9-15; 88-5727 Pet. 7-13) that the court of appeals failed to follow the plain meaning of Rule 41(e), which states in part that "[i]f the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial." While that language is plain enough as far as it goes, it does not

answer the question whether exclusion of evidence follows automatically upon a finding that the evidence was illegally seized, as petitioners assert. The Rule permits a person "aggrieved by an unlawful search and seizure" to move for return of the seized property "on the ground that such person is entitled to lawful possession of the property which was illegally seized." While the Rule provides for exclusion of the evidence if the motion is granted, it does not set forth the principles that govern the circumstances under which the motion should be granted. Indeed, the Rule suggests that exclusion does *not* follow automatically from a finding that the evidence was illegally seized, since exclusion follows only if the court grants the motion for the return of property after finding that the aggrieved person is entitled to possession of the property. And a person whose property has been held admissible in a judicial proceeding is not entitled to immediate possession of that property; the implication of a ruling that the property is admissible in evidence is that the prosecution is entitled to possession of the property until it serves its evidentiary purpose.[3] Therefore, while the language of the Rule is somewhat opaque, it certainly does not provide clear support for petitioners' position.

As the court of appeals explained (Pet. App. 5a-7a), both the Advisory Committee Notes to the Rule and this Court's decision in *United States* v. *Calandra,* 414 U.S. 338 (1974), indicate that petitioners' interpretation of the Rule is wrong. In its original form, Rule 41(e) set forth five specific grounds on which a motion to suppress could

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[3] If the moving party were entitled as a matter of law to immediate possession of illegally seized property, it would be pointless to hold that the exclusionary rule did not render the evidence inadmissible. A party could always defeat the admission of the evidence by moving, under Rule 41 or otherwise, for the return of the illegally seized evidence before it was offered at trial.

be based. The notes to the original version of Rule 41 explain that the Rule was intended to be "a restatement of existing law and practice." Notes of Advisory Committee on Rules (1972 Amendment) (18 U.S.C. App. at 639). The note then cited several of this Court's decisions on search and seizure issues and the exclusionary rule, an indication that the Rule was meant to track current practice with regard to governing Fourth Amendment and exclusionary rule principles. When the Rule was amended in 1972, the Advisory Committee explained that it was deleting the specific grounds for a motion under the Rule, because "substantive grounds for objecting to illegally obtained evidence (*e.g., Miranda*) are not ordinarily codified in the rules" and because the grounds specified in the Rule were by that time "not entirely accurate." Notes of Advisory Committee on Rules (1972 Amendment) (18 U.S.C. App. at 640). Pet. App. 5a-6a. Again, the Committee's explanation indicates its intention to have the Rule track the principles of search and seizure law that were established by this Court, not to freeze the Fourth Amendment and exclusionary rule principles as of any particular moment in time.

That interpretation of the Rule is entirely consistent with this Court's decision in *United States* v. *Calandra, supra.* In *Calandra,* the respondent had filed a Rule 41(e) motion for the preindictment return and suppression of certain illegally seized records. Although the Rule 41(e) motion was not directly at issue in the case, the Court observed in passing that a motion under Rule 41(e) confers no rights on the movant beyond those based on the Constitution itself (414 U.S. at 349 n.6):

> We have recognized that Rule 41(e) is "no broader than the constitutional rule." *Alderman* v. *United States,* 394 U.S. 165, 173 n.6 (1969); *Jones* v. *United States,* 362 U.S. 257 (1960). Rule 41(e), therefore,

> does not constitute a statutory expansion of the exclusionary rule.

While petitioners contend that that language should be limited to the "standing" doctrine that was the immediate subject of the Court's remark (see 88-495 Pet. 16-19; 88-5727 Pet. 12-13), there is no such limitation suggested in the Court's comment, nor is there any reason to distinguish between the "standing" doctrine and other principles limiting the applicability of the exclusionary rule for purposes of construing Rule 41(e).

Finally, if the Rule were interpreted as petitioners suggest, it would lead to absurd results. The last sentence of the Rule provides for treatment of a motion under Rule 41(e) as a motion to suppress under Fed. R. Crim. P. 12 if it is made or comes on for hearing after an indictment or information has been filed. Under petitioners' construction of Rule 41(e), the exceptions to the exclusionary rule would not apply to motions made or heard before indictment, but they would apply if an indictment intervened before the motion were made or heard. To adopt such a construction of Rule 41(e) would be irrational, as it would make the critical issue of suppression turn on a matter as irrelevant as the timing of an indictment. As the court of appeals observed (Pet. App. 9a), "there is nothing in the legislative history to indicate that in enacting Rule 41(e) Congress intended such an anomalous result."

3. Because the issue presented in this case has not provoked a conflict among the circuits, and because the court of appeals' decision is clearly correct, review by this Court is unwarranted. In any event, however, there is another reason that the petitions should be denied: the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has recently approved a change in Rule 41(e) that would expressly adopt

the position taken by the court of appeals in this case. The proposed amendment would omit the language of the current Rule that requires the suppression of evidence. The Advisory Committee Notes explain that that language "has not kept pace with the development of exclusionary rule doctrine and is currently only confusing," citing *United States* v. *Leon, supra,* as well as other Fourth Amendment decisions. Proposed Rules, 120 F.R.D. 395, 427-428 (1988). "Rule 41(e) is not intended," the Advisory Committee Notes state, "to deny the United States the use of evidence permitted by the fourth amendment and federal statutes, even if the evidence might have been unlawfully seized. * * * Thus, the exclusionary provision is deleted, and the scope of the exclusionary rule is reserved for judicial decisions." 120 F.R.D. at 428.

If adopted, the proposed amendment to the Rule will remove any doubt about the correctness of the decision of the court of appeals in this case. Accordingly, it appears likely that the issue presented in this case will become one of diminishing importance that may never require this Court's intervention.

4. Petitioner Bromberg also claims (88-5727 Pet. 14-16) that the good faith exception cannot apply in this case because the warrant was defective for lack of particularity. He argues that there is a conflict among the circuits on the question whether the "good faith" exception to the exclusionary rule is available when a court has found the warrant defective on this basis. In fact, however, the court of appeals did not address the question whether the warrant in this case was invalid for lack of particularity (see Pet. App. 4a). All that the court of appeals held was that the "good faith" exception to the exclusionary rule is not per se inapplicable to preindictment Rule 41(e) motions. The question petitioner Bromberg raises is therefore not presented in this case.

In any event, the cases petitioner cites do not establish a clear conflict among the circuits on the question whether the "good faith" doctrine is applicable to violations of the particularity requirement. In the cases he cites, the First and Ninth Circuits have held that the good faith exception was not applicable to the particular overbroad warrant at issue in each case. See *United States* v. *Fuccillo,* 808 F.2d 173, 177 (1st Cir. 1987), cert. denied, No. 86-1622 (June 1, 1987); *United States* v. *Spilotro,* 800 F.2d 959, 968 (9th Cir. 1986); *United States* v. *Washington,* 797 F.2d 1461, 1473 (9th Cir. 1986); *United States* v. *Crozier,* 777 F.2d 1376, 1381-1382 (9th Cir. 1985). But in those cases the courts did not adopt any general rule that evidence seized under an overbroad warrant could not be saved by the "good faith" doctrine; the courts simply found that the particular warrants at issue in those cases were so facially deficient as to defeat any claim of objective good faith on the part of the executing agents. Both the First and Ninth Circuits have recently applied the "good faith" doctrine to admit evidence challenged on particularity grounds, where the warrants in question were not glaringly deficient. See *United States* v. *Diaz,* 841 F.2d 1 (1st Cir. 1988); *United States* v. *Michaelian,* 803 F.2d 1042 (9th Cir. 1986). It is therefore clear that those courts have not adopted the broad rule that petitioner attributes to them, and that there is no conflict between the decisions of those circuits and the decision of the Second Circuit in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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